

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2102

BB
P/S

To be argued by
MARTIN E. GOTKIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARTIN HERNANDEZ and VICTOR HERNANDEZ,
Petitioners-Appellants,

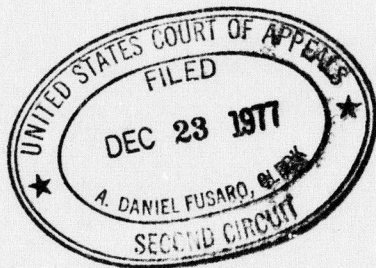
v.

WALTER FOGG, Superintendent Green
Haven Correctional Facility,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK

BRIEF FOR PETITIONERS-APPELLANTS



MARTIN E. GOTKIN
Attorney for Petitioners-
Appellants
250 West 57th Street
New York, New York 10019
Telephone (212) 541-8390

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This is an appeal from an order of the United States District Court for the Southern District of New York (Werker, J.) dated August 15, 1977 denying without a hearing the petition for Habeas Corpus.

QUESTION PRESENTED

Did the District Court err in denying the petition without affording petitioners the right to an evidentiary hearing?

STATEMENT OF THE CASE
AND PRIOR PROCEEDINGS

THE CASE IN THE WESTCHESTER COUNTY COURT

In November of 1970 petitioners Martin Hernandez and Victor Hernandez and one Madeline Pineda were jointly indicted in the Westchester County Court (Indictment No. 852-70) for the Class A felonies of possessing a dangerous drug in the first degree and selling a dangerous drug in the first degree. On July 27, 1971 after a jury trial the petitioners and defendant Pineda were found guilty as charged.

On September 13, 1971 the defendant Pineda and Martin Hernandez each received sentences of twenty-five (25) years to life, and the defendant Victor Hernandez received a sentence of twenty (20) years to life. The petitioners are still serving this sentence at Green Haven Correctional Facility.

On March 13, 1973 the Supreme Court Appellate Division: Second Department affirmed the sentences without opinion and leave to appeal to the New York State Court of Appeals was denied.

THE CASES IN THE UNITED STATES DISTRICT COURT: EASTERN
DISTRICT OF NEW YORK

(A) On August 2, 1971, a one count indictment (71CR874) was filed in the U.S. District Court, Eastern District of New York naming both petitioners and one Enrique Hernandez, a brother of petitioners and others charging conspiracy to violate the Federal narcotics laws.

On February 18, 1972 after being found guilty by a jury the petitioners and Enrique Hernandez were sentenced as follows; Martin Hernandez - 15 years; Victor Hernandez - 10 years and Enrique Hernandez - 15 years and a \$20,000 fine, with a recommendation by the Court that the sentences in each case be served in a New York State Facility. These judgments were subsequently affirmed.

(B) On February 28, 1972 the petitioners were named along with 21 other defendants in a one count indictment (77CR 228) charging conspiracy to violate the Federal Narcotics Laws. On July 25, 1973 this indictment was dismissed against the petitioners because of the finding of guilty and the judgments under 71 CR 874.

THE HEARING OF NOVEMBER 15, 1974 *

In July 1974 Enrique Hernandez (not either of the petitioners) brought a motion pursuant to 28 U.S.C. 2255 in the U.S. District Court, Eastern District of New York under indictment No. 71 Cr. 874 for a new trial based on newly discovered evidence, to wit: that a Detective James Sottile of the now defunct Special Investigations Unit of the New York City Police Department who was a Government witness in 71 Cr. 874 had admitted in another case in the U.S. District Court: Southern District of New York (74 Cr. 229-Wyatt, J) that he had

*The full minutes of this hearing are set forth in the Appendix (60a et. seq.)

perjured himself in other warrants and wiretap applications and that therefore the wiretap obtained in 71 Cr. 874 may have been the result of perjured statements. The Government in opposition stated that Sottile's testimony was "solely confined to a seizure of narcotics from defendants Olate and Quintanilla" and that Sottile offered no testimony directly concerning the defendant Enrique Hernandez. Moreover no testimony was given by Sottile concerning any court authorized wire tapping and specifically no testimony was given by Sottile concerning the interceptions of conversations by Enrique Hernandez. In fact the wiretap evidence was based on the affidavit of a police officer other than Sottile and that alleged disclosures in the Hernandez motion are "irrelevant" to this case.

On November 15, 1974 a hearing was held on the motion before Judge Weinstein. At the hearing Sottile testified that he maintained an illegal telephone wiretap on the Chile-Lindo restaurant from September 1970 to November 1970 during an investigation of Olate Romero and Quintanilla. Enrique Hernandez testified that from early September to the middle of November 1970 he talked over the telephone to his brothers Martin and Victor Hernandez (Petitioners herein) from the Chile-Lindo Bar relating to narcotic drugs.

After the hearing counsel for defendant argued that had the Court known of the illegal wiretaps that some of the narcotics seized may have been from an illegal lead and that they were seized as the fruits of that wiretap.

The Government argued that Enrique Hernandez had no "standing" to object to the particular seizure and that these were just a small part of the narcotics brought in and do not bear directly on Enrique Hernandez.

The Court (Weinstein, J.) then held:

"The defendant...had a very fair trial. He was convicted out of his own mouth, his wiretaps were very convincing; and the wiretap that we had in this case and that was introduced was legally obtained. There is no indication to the contrary...These seem to me to be stabs in the dark. There is information now abroad that a number of people involved in narcotics control were crooks. That is not the basis for setting aside everyone of these verdicts and going into background on each one of them. There is no indication here of any connection... I haven't the slightest doubt of Mr. Hernandez's conviction on the basis of the evidence we had...Motion denied."

THE MILLER WIRE TAP

It appears, as contended by the prosecution in the State case in Westchester that Members of the Special Investigating Unit of the Narcotics Division of the New York City Police Department were involved in an investigation of large scale narcotics transactions when during the week of August 16, 1970 they received information about such dealings by one James Miller. As a result of their further investigation, a wiretap order was signed by Honorable Jawn A. Sandifer on September 3, 1970 permitting the interception of certain calls over his telephone.

While intercepting calls under that order, the officers overheard conversations between Miller and Enrique Hernandez (who had a prior felony narcotics arrest) and made observations of them which indicated that Hernandez was the supplier for Miller. On September 25, 1970 Honorable Gerald P. Culkin signed an order permitting the interception of certain calls over Hernandez' phone.

During the course of that interception, officers overheard conversations between Hernandez and Madeline Pineda which indicated that Pineda was importing large quantities of narcotic drugs from her husband Hugo in Chile. As a result of the information set forth in the affidavits of Honorable Frank S. Hogan and Detective Owen Brodeur, an order was signed by Honorable George Beisheim, Jr. on October 21, 1970 permitting the interception of certain calls over Pineda's telephone.

On April 22, 1971 prior to the trial in County Court; Westchester County a written motion was made by counsel for Petitioners seeking to declare "all eavesdropping warrants as being void...and declaring any conversations obtained as a result of the void wire tap orders being considered 'fruit of the poisonous tree' and inadmissible."*

*[The one page supporting affidavit did not mention specifically the eavesdropping warrant of Justice Jawn A. Sandifer of Supreme Court: New York County dated September 3, 1970 which is the subject of this particular part of this memorandum; however, it is being assumed that counsel in his motion included this warrant when he referred to "all" eavesdropping warrants.]

Judge Sullivan of the Westchester County Court on May 12, 1971 rendered a written decision wherein the Court noted that counsel had been served with the wiretap affidavits and that counsel did not have the right to listen to the tapes. The Court then denied the motion. It is clear from the decision and from the testimony at the hearing to suppress which is referred to below that no hearing of any kind was held on this motion.

In the Memorandum of Law submitted by the District Attorney of Westchester County (116a) is it stated at page 4 that: "The defendants [petitioners herein] were given full opportunity to contest the legality of the eavesdropping orders in the State Courts and did litigate their validity in the trial court and on appeal." However a reading of the trial transcript of Indictment No. 852-70 in the Westchester County Court seems to indicate otherwise. Thus at the hearing to suppress physical evidence recovered in an alleged illegal search wherein the Court noted that counsel was attempting to argue that one of the wiretap orders previously made was illegal the following colloquy took place at page 8-9 on June 24, 1971:

"MR. LENEFSKY (Counsel for Defendant Pineda): In addition to that, in addition to the objection made by Mr. Lanna (Attorney for Martin Hernandez). I object on the grounds that...that there is no probable cause shown for the order permitting the telephone tap.

JUDGE BEISHEIM: As I understand it, there has been a motion made on that and the wire tap has been sustained and it is the law of the case,...I overrule the objection and give you an exception."

and further on at page 460-466:

"JUDGE BEISHEIM: What we are deciding at this hearing is on the illegality of the search of the defendant's person in her apartment. Now what you are arguing Mr. Lenefsky, is that for some reason or other one of the wiretap orders previously made was illegal.

Mr. LENEFSKY: Which led to the search.

MR. DONOHUE (Asst. D.A.): If your Honor please... It is just a patent attempt to open up the issue of the validity of the search and the eavesdropping warrant...

THE COURT: ...(W)as there not a motion before... Judge Sullivan...contesting the legality of that and the other wiretap oreders.

MR. DONOHUE. Yes, Your Honor, Judge Sullivan, by decision dated June 3, 1971, denied the motion.

THE COURT: It is June 3, 1971, and the last paragraph says: 'The foregoing constitutes a decision and order of this Court on the motion'. The Court said there: 'The Court has read the affidavit submitted in support of each wiretap order herein and finds that they fully comply with the requirements of the code'...

MR. LENEFSKY: Now, if we can show that the third wiretap was pursuant to the order permitting the wiretapping of the other two and that it was based upon a false misrepresentation...then I say to your Honor that the wiretap was not legal and that the probable cause upon which they seek to base the information received pursuant to that illegal wiretap is very germane.

THE COURT: Yes. But neither Judge Sullivan nor Judge Bruchell, who was in this someplace, nor myself gave you any hearing on those matters. I say that Judge Sullivan's order is the law of the case here and I am not going to go behind it."
(Emphasis supplied).

THE PETITIONERS' MOTION TO VACATE THE JUDGMENT OF THE SUPREME COURT: WESTCHESTER COUNTY

On March 15, 1976 the petitioners by Notice of Motion sought to vacate the judgment of the County Court, Westchester County (3a) based on the disclosures of the November 15, 1974 hearing of Enrique Hernandez. It was petitioners' contention that this arrest was the result of an illegal search and seizure in that the arrest resulted from the illegal wiretap placed on the telephone of the Chile-Lindo Restaurant as testified to by Det. Sottile in the hearing before Judge Weinstein.

Petitioners further contended that their arrest was not the result of the telephone tap which was placed on the telephone of a drug dealer by the name of James Miller.

On May 21, 1976 Judge Beisheim rendered a decision (34a) denying the defendants' (Petitioners herein) motion to set aside the judgment of conviction entered against them wherein he held:

"In reference to the alleged illegality of the wiretap on the telephone of James Miller, pursuant to wiretap order of September 3, 1970, signed by Justice Juan A. Sandifer, Supreme Court, New York County, motions previously made challenging the validity of such order was denied by Judge Sullivan of the Westchester County Court before defendants' trial on May 12, 1971. Such ruling was declared the law of the case and was pursued throughout the trial of the respective defendants herein in the Westchester County Court as same was conducted before the Hon. George Beisheim, Jr."

After the denial of petitioners' motion to vacate their judgments the instant Habeas Corpus proceeding was instituted and this writer was appointed as CJA counsel by Hon. Henry F. Werker Counsel undertook to supply the District Court with the records and transcripts of the State and Federal court proceedings with which the petitioners were involved*and to supply the Court below with memoranda and other information concerning the background and facts of the case.

After being supplied with all the records and proceedings the Court below denied the writ without a hearing in its opinion dated August 25, 1977 (133a). Counsel after applying and being granted a Certificate of Probable Cause (140a) filed a Notice of Appeal (141a).

*The entire state court trial transcript, hearing minutes as well as motion papers and affidavits will be made part of the record on appeal to be sent up to this Court from the District Court.

POINT I

THE COURT BELOW ERRED IN DENYING
THE PETITION WITHOUT AN EVIDENTIARY
HEARING.

Title 28 §2243 provides in part as follows:

"A Court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto...The Court should summarily hear and determine the facts and dispose of the matter as law and justice require.

The court below in its opinion (133a) stated at page 5 in denying the writ:

"The only facts on which petitioners pin their claim are refuted by the testimony which they cite. Nor do petitioners allege that the facts are not as indicated by the uncontradicted testimony at the Enrique Hernandez hearing."

Although the Court correctly noted that "these petitioners are not bound by the testimony adduced at the Enrique Hernandez proceeding to which they were not parties" (135-6a) the Court in effect is binding these petitioners to the facts brought out in the hearing.

Certainly a significant issue has been raised concerning the illegal wiretap at the Chile-Lindo Restaurant and whether the information from this tap was what really resulted in petitioners arrest. The petitioners should have the right to now conduct a hearing to have their own counsel question detective Sottile and other witnesses.

Many significant questions are unanswered from the Enrique Hernandez hearing. Thus there was no development on the examination of Sottile as to whether the telephone at the Chile-Lindo was a public telephone in a booth, or on the wall not enclosed in a booth.

The learned Judge below noted at page i of his decision at note 3:

"...if the telephone in question was a public telephone in a booth, the issue as to whether or not the petitioners have a fourth amendment claim would be revolved in their favor by the Supreme Court's ruling in Katz v. United States 389 U.S. 347 (1967)"

If an opportunity were given for a hearing this fact could be established by the records of the New York Telephone Company and also by possibly other witnesses and by a more probing examination of Detective Sottile.

It is undisputed that the tap was illegal and that Enrique Hernandez spoke to both of the petitioners concerning drug transactions over that telephone from September 1970 to November 1970.

The Court below put great weight on the testimony of Det. Sottile although by his own admission he never revealed the illegal tap to the Assistant U.S. Attorney (75a-page 16 of Tr.) and admits that he lied to Judge Weinstein during the trial. (90a -pg. 31 of transcript).

As pointed out above it appears that Detective Sottile who was a government witness in 71 Cr. 874 had admitted in another case in the U.S. District Court; Southern District of New York (74 CR 229, Wyatt J.) that he had perjured himself in other warrants and wiretap applications.

Certainly this should afford a reasonable basis for a hearing where these petitioners and their counsel can participate and question Sottile in the manner they choose.

In the case of Dixon v. Caldwell, 471 F. 2d 767 (5th Cir. 1972) that Court reversed the District Court's denial without a hearing on the merits of petitioner's habeas corpus petition and stated in words most apt to the instant case as follows at page 771:

"28 U.S.C.A. §2254 invokes not a perfunctory rite but a statutory command to vouchsafe constitutional rights by an evidentiary hearing unless it would be a superfluity. Corroboration of a petitioner's testimony is neither a statutory nor a constitutional requirement.

We do not asseverate that the trial court could not find Dixon disentitled to belief, but no judge, be he robed by state or nation, has made this finding. Orwell's 1984 has not yet arrived and we do not have all seeing eyes and all hearing ears, and unless and until that fateful day comes corroboration is not an inherent concomitant of the Great Writ of Habeas Corpus. We have no per se rule to deny the Writ if the petitioner lacks corroboration. The judge is free to find a supplicant for the Writ a prevaricator in his testimony, but where there is no contradictory testimony the state court must explicitly and unequivocally so find before a federal court can deny the Writ without an evidentiary hearing. The Writ is made of sterner stuff.

Reversed and remanded with instructions."

Petitioners also contend that they did not have in the State Court "an opportunity for full and fair litigation of a Fourth Amendment claim" as mandated in Stone v. Powell, 428 U.S. 465 (1976).

Firstly there was never a hearing in the State court on trial counsel's motion to suppress the Miller wire tap order and in addition Petitioners were never afforded a hearing in the County Court of Westchester where they brought their motion to vacate their judgment based on the newly discovered evidence which came out on the Enrique Hernandez hearing in November 1974.

In the case of Townsend v. Sain, 372 U.S. 293 (1963) cited in Stone v. Powell, that Court held that an evidentiary hearing was required where "newly discovered evidence" is

alleged; the State Court did not develop adequately the constitutional claim and the State Court has not after a full hearing reliably found the relevant facts.

The Court in Townsend in discussing when a hearing was required set forth six situations - the last three of which are relevant here and which the Court discussed in detail at pages 317 - 318 as follows:

"(4) Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus. Also, the district judge is under no obligation to grant a hearing upon a frivolous or incredible allegation of newly discovered evidence.

(5) The conventional notion of the kind of newly discovered evidence which will permit the reopening of a judgment is, however, in some respects too limited to provide complete guidance to the federal district judge on habeas. If, for any reason not attributable to the inexcusable neglect of petitioner, see Fay v. Noia, post, p. 438 (Part V), evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled. ... Compare Price v. Johnston, 334 U.S. 266, 291: "The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither

necessary nor reasonable to deny him all opportunity of obtaining judicial relief."

(6) Our final category is intentionally open-ended because we cannot here anticipate all the situations wherein a hearing is demanded. It is the province of the district judges first to determine such necessities in accordance with the general rules. The duty to try the facts anew exists in every case in which the state court has not after a full hearing reliably found the relevant facts."

Certainly the case at bar falls into one, two or all of the categories which would mandate an evidentiary hearing.

The petitioners contention is that they did not know about the illegal tap at the Chile-Lindo until after their State trial. Thus this issue was not able to be raised or explored during the state court trial or appeals.

Thus Judge Beisheim in his decision of May 21, 1976 (34a) at page 3 was clearly misapplying the facts when he stated that:

"Other than what has been offered and passed upon before or that which could and probably should have been incorporated in their appeal from the judgment of conviction to the Appellate Division, the defendants now offer nothing new in the way of factual matter to justify a hearing or the setting aside and vacating the judgment of conviction. The defendants may not now seek indirectly to relitigate issues which were previously raised on trial and on appeal and decided adversely to them."

It is submitted that the petitioners in the State Court were never afforded "an opportunity for full and fair litigation" of their Fourth Amendment claim and therefore under the circumstances herein an evidentiary hearing should have been held on the petition for Habeas Corpus relief.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD
BE REVERSED AND THE PETITION GRANTED TO
THE EXTENT OF SETTING THE MATTER DOWN
FOR AN EVIDENTIARY HEARING.

Dated: New York, N.Y.
December 21, 1977

Respectfully Submitted,

MARTIN E. GOTKIN
Attorney for Petitioners-
Appellants
(Assigned Counsel)

AFFIDAVIT OF MAIL SERVICE

ALFRED BUSH JR being duly sworn deposes
and says: On December 22nd, 1977 I served the
within Joint Appendix and Brief on
Carl A. Vergari the attorney for the Respondent-
Appellee by mailing three copies thereof to
his office located at 111 Grove Street, White
Plains, New York, 10601.

Sworn to before me
this 22nd day of December, 1977.

Sylvia Morris

SYLVIA MORRIS
Notary Public, State of New York
No. 314526051
Qualified in New York County
Commission Expires March 30, 1978

Alfred Bush Jr

